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SUPREME COURT, U.S.

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NO. 378

In the Supreme Court of the United States

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA, *Appellant*,

v.

JAMES CLARENCE EVANS, Commissioner of Finance and Taxation of the State of Tennessee, JOHN F. KISER, His successor in office, and J. M. DICKINSON, Present Commissioner of Finance and Taxation.

Appeal from the Supreme Court of the State of Tennessee.

STATEMENT AS TO JURISDICTION.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity.

ESSO STANDARD OIL COMPANY AND UNITED STATES OF AMERICA, *Appellants*

v.

JAMES CLARENCE EVANS AND HIS SUCCESSORS IN OFFICE AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, *Appellee*

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America, intervenor-appellant, submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Tennessee entered in this cause.

OPINION BELOW

The opinions of the Supreme Court of Tennessee and of the Chancellor in the Chancery Court

at Nashville are not reported. Copies of these opinions are attached hereto in Appendix A and B,* respectively.

JURISDICTION

1. The judgment of the Supreme Court of Tennessee was entered on June 7, 1952. A petition to rehear, seasonably filed by appellant Esso Standard Oil Company on June 16, 1952, was entertained and denied with an opinion on July 11, 1952. The jurisdiction of the Supreme Court of the United States to review these decisions by direct appeal is conferred by Title 28, United States Code, Section 1257(2) and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *Allegheny County*, 322 U.S. 174, 191; *United States* v. *Burnison*, 339 U.S. 87; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261; *Pacic Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U.S. 285; *Standard Oil Company* v. *Johnson, Treasurer of California*, 316 U.S. 481.

2. In its bill of complaint, Esso Standard Oil Company alleged that "the Tennessee gasoline

* (Clerk's Note—These opinions are printed as an appendix to the Statement as to Jurisdiction in Esso Standard Oil Co. v. Evans, No. 330 O.T. 1952 and are not reprinted here).

tax law," if construed to cover this case, "is invalid and void because it is repugnant to the Constitution of the United States" (par. XIX), that the assessment of the tax "is illegal and void for the reasons that such assessment is upon the exclusive property or instrumentality of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States" (par. XX), that the assessment "imposes a tax on property which is an instrumentality of the United States and constitutes an unconditional imposition upon the United States" (par. XXI), and that the Commissioner of Finance and Taxation "has applied these provisions of the Tennessee gasoline tax laws in a manner which renders that law invalid under the Constitution of the United States" (par. XXII). In intervening, the United States adopted these allegations. The Chancery Court ruled against these contentions (Appendix B). The contentions that the state gasoline tax statute and the assessment of the tax were illegal and void under the federal Constitution, because in conflict with the immunity of the United States from state taxation, were preserved on appeal to the Supreme Court of Tennessee by assignments of errors filed by Esso Standard Oil Company and adopted by the United States. The Supreme Court of Tennessee ruled adversely to these contentions (Appendix A).

With respect to the contention that the statute, as applied, unconstitutionally discriminates against Esso and the United States, and violates the Equal Protection Clause of the Fourteenth Amendment (which provision was first specifically mentioned in Esso's petition to rehear in the Supreme Court of Tennessee), the United States adopts the statement made by Esso Standard Oil Company in its Statement as to Jurisdiction heretofore filed in the cause, to the effect that the Equal Protection and discrimination issues were seasonably raised. It was argued to the Supreme Court of Tennessee, in Esso's brief on the original hearing, that the court's prior decisions (particularly the case of *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683) required a holding that the tax was inapplicable here. The brief added (p. 42): "Necessarily the same rule must be applied when the implied immunity of the United States is involved; otherwise Tennessee has discriminated against the United States." When the State Supreme Court refused to apply the "same rule" to the instant case, at the same time adhering to its prior decisions, the Equal Protection issue was raised in Esso's petition to rehear.

3. This Court has jurisdiction to consider those issues presented herein which may not be appliable under 28 U.S.C. 1257(2), but are reviewable by certiorari under 28 U.S.C. 1257(3), since all such issues are included in the Assignment of

Errors filed herewith. See *Flournoy* v. *Wiener*, 321 U.S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547. See also 28 U.S.C. 2103.

QUESTIONS PRESENTED

1. Whether the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing gasoline for the United States, is invalid under the Federal Constitution to the extent assessed with respect to gasoline owned by the United States.

2. Whether the Tennessee gasoline tax statute unconstitutionally discriminates against the United States in that, as construed by the State Supreme Court, it imposes a tax with respect to gasoline owned by the United States in circumstances where the same tax would not be levied if the gasoline were owned by others.[1]

STATUTE INVOLVED

The pertinent provisions of the Tennessee gasoline tax statute are set forth in Appendix C.

STATEMENT

This is a test suit by Esso Standard Oil Company, a contractor with the Government, to recover certain gasoline taxes assessed and collected from it by the State of Tennessee with respect to

[1] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the major issues.

Government-owned gasoline stored by Esso for the United States. The United States, which has agreed to reimburse Esso for taxes incident to its contract, intervened in the trial court in support of Esso and has since participated in the case.

1. During the time involved in this suit (January 1944), Esso was engaged in performing a contract with the United States by which it agreed to receive and store in its own facilities at Memphis, Tennessee, and in facilities leased for that purpose, gasoline belonging to the United States which was brought to Tennessee from without the State. At the direction of the Air Forces, Esso delivered the gasoline to an Air Force base in Tennessee, or delivered it to carriers employed by the United States for transportation to bases or points within or outside of Tennessee. For its services, depending on their scope, Esso received amounts ranging from .18 cents to 6.3 cents per gallon; the bulk of the payments were at the .18 cents rate.

In greater detail, the course of operations was as follows:—The gasoline—aviation gasoline—was produced in other States by several refineries, Esso being only one of them. Upon production, it became the property of Defense Supplies Corporation (DSC), a World War II subsidiary of Reconstruction Finance Corporation, and came, for allocation purposes, under the jurisdiction of the Petroleum Administration for War (PAW).

The gasoline involved here was allocated by PAW to the Army Air Forces for use at air bases and airfields in the South.

Upon presentation of the proper allocation certificates to its agents, DSC delivered the gasoline to an authorized property officer of the Army Air Forces, either at a refinery in Louisiana or Oklahoma or at the pipeline in East St. Louis, Illinois. The Air Forces would then arrange for transportation by barge to Memphis. This transportation generally was by outside carrier on a Government bill-of-lading, but not infrequently was on Government barges towed by a contract tug. The trial court found that "in the true sense, Standard Oil Company was neither consignee nor consignor, but that the substance of the transaction was that the government itself was the consignee of each of these shipments * * *."

Upon arrival in Memphis, the gasoline was pumped by Esso into its tanks. Commingling with Esso's own gasoline occurred only in minor quantities and then only in grade 91 octane. At that time, all supplies of the other grade—100 octane—were wholly owned by the Government, and the 100 octane grade constituted the bulk of the gasoline in controversy.

After storage, Esso delivered the gas only upon written direction by the Air Forces. Except for the relatively small gallonage delivered to the Memphis Air Base, the gasoline was placed by

Esso for delivery in tank trucks owned by the Government, or in similar trucks of carriers under contract with the Air Forces. A very substantial part of the gasoline was transported to air bases outside of Tennessee, in Mississippi, Arkansas, etc.

2. The Tennessee statutes impose a "special privilege tax" on all "distributors" of gasoline in the State, "for engaging in and carrying on such business in this State," "in an amount equal to seven cents for each gallon of gasoline * * * refined, manufactured, produced, or compounded by such distribution and sold, stored, or distributed by him in this State, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within the State * * *."

Although they had full knowledge of all the facts, and Esso presented the required reports, the Tennessee revenue officials did not seek to assess, collect or demand this tax from Esso until August 1949, some time after the completion of full performance of Esso's contracts with the United States. During the contracts' performance, both Esso and the United States were led to believe that no tax was due. Relying upon this administrative construction, the United States and Esso continued their arrangement through 1944 and in subsequent years.

3. As noted above, demand was first made in August 1949. Esso paid under protest the amount

demanded for the month of January 1944, and then brought this suit to recover. The Chancery Court disallowed certain inspection fees paid by Esso, and also disallowed interest and penalties, but held for the State on the gasoline tax itself (in the amount of $196,848.68). The State Supreme Court affirmed.

The arrangement between Esso and the United States began in 1943 and ended in 1946. The statute of limitations bars collection of the tax for 1943, but not for 1944, 1945, or 1946. The instant suit, involving only the month of January 1944, is a test case. If the ruling of the state courts as applied to the rest of 1944 and the succeeding years, the amount collected by the State for that period will amount to upwards of $3,800,000 (as calculated by the State). Including the judgment below, the amount is over $4,000,000.

THE QUESTIONS ARE SUBSTANTIAL

Tennessee has imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which Esso ordinarily received only .18 cents a gallon. The tax is sought to be supported as merely a privilege tax on Esso's business as a bailee of gasoline, but in this case it actually and in full effect is equivalent to the normal gasoline tax and amounts to an unconstitutional imposition upon the Government-owned gasoline. Moreover, Tennessee's taxing statute,

as construed by its highest court, discriminates in its incidence against the United States by taxing in circumstances where the same tax would not be levied if the gasoline were owned by another than the United States.

1. If the tax here is in substance on the Government's gasoline, it is clearly invalid under the Supremacy Clause and the established constitutional doctrine which immunizes the Federal Government from State taxes. As this Court said in *United States* v. *Allegheny County*, 322 U.S. 174, 177: "* * * unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of State taxation." "We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, *either as against the Government itself or as against one who holds it as a bailee*" (p. 189) (emphasis supplied). See also *Mayo* v. *United States*, 319 U.S. 441, 447-8.

Though the State Supreme Court has characterized the tax as not on the gasoline but a "privilege tax" on Esso for storing gasoline in Tennessee,[2] and though the statute calls the levy "

[2] In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683 (1941) (discussed below), the court spoke as if the tax was imposed directly on the gasoline.

special privilege tax * * * for engaging in and and carrying on such business in the State * * *," this Court is entirely free to disregard such designations. It can decide for itself, despite the language used by the state legislature and the state courts, the true incidence and impact of the tax, and its effect upon the right of the United States. *Wisconsin* v. *J. C. Penney*, 311 U.S. 435, 443; *United States* v. *Allegheny County*, 332 U.S. 174, 184; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 84; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 674. And this Court's inquiry is whether "in practical operation and effect" the tax is a tax on Government-owned gasoline, regardless of the "label employed in describing it." *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*, at pp. 673, 674.

Realistically viewed, the Tennessee tax as applied here is simply a tax on gasoline, equivalent to the gasoline taxes levied by most States, formally imposed in this instance on the bailee of the gasoline. A tax of 7 cents per gallon of Government gasoline obviously cannot be laid merely on Esso's storing business where Esso's compensation from the Government for carrying on that business is ordinarily only .18 cents per gallon. In "practical operation and effect," a heavy tax of this character, measured solely by gallonage

owned by someone else and taking no account of the taxpayer's gross or net receipts from its business or its expenses, does not tax the business at all. It is a plain imposition on the Government gasoline which flowed in and out of Esso's tanks.[3]

United States v. *Allegheny County*, 322 U.S. 174, 183-185, is a closely comparable case. There, the real property was owned by Mesta Machine Company, a Government contractor, and the affixed machinery belonged to the United States. The tax sought to be collected from Mesta related only to the machinery, but, like the State here, the county sought to justify it on the ground that it was formally levied on Mesta's realty and was merely measured or enhanced by the Government's personality. Looking at the tax for itself, this Court determined that the substance of the imposition was on the Government's property and and therefore invalid. In this case, too, the tax is collectible from the contractor-bailee, and is

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[3] The circumstances were far different in *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, and *Graves* v. *Texas Company*, 298 U.S. 393, which were overruled in *Alabama* v. *King & Boozer*, 314 U.S. 1, 9 (see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 277). In those cases, the fact that the tax was called a "privilege" tax was unimportant, because the taxpayer-company owned the gasoline which was only *later* sold to the United States. A direct tax on such privately-owned gasoline would today clearly be held valid. Similarly, in *Wilson* v. *Cook*, 327 U.S. 474, upholding a state tax on one who purchased and severed timber on Govern-

formally designated as imposed on a non-immune subject, *i.e.*, the contractor's privilege of doing business. But, as in *Allegheny County*, the realty is that the tax is laid on Government property.

2. Moreover, the Tennessee statute, as well as the tax itself, unconstitutionally discriminates to the disadvantage of the United States and of Esso. In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, in 1941, the State Supreme Court held this taxing statute inapplicable to a situation hardly distinguishable in pertinent facts from this one—except that the United States was not involved:—The Obion County Board of Education made an arrangement with the oil company by which the latter procured out-of-state gasoline for the Board at cost plus freight, had it shipped to Tennessee, stored it in a tank leased to the Board for one dollar, and then delivered it on order of the Board, at a charge of 2 cents per gallon. The taxing authorities sought to tax the oil company with respect to the gasoline. The Supreme Court held that "the determinative question is:—To whom does the gasoline belong when it comes to rest in the State of Tennessee? *If it belongs to the governmental unit, it is exempt from taxation*" (178 Tenn. at 691, emphasis supplied). Since the Board, an exempt agency, owned the gasoline, the State could not "impose a tax on the gasoline in question" (178 Tenn. at 692).

In its discussion of the *Tennessee Oil* case in the opinion below, the Supreme Court seems to stress the "one-dollar lease" of the tank to the Board as a decisive factor, but in the *Tennessee Oil* case itself it found the "determinative" issue to be the ownership of the gasoline, not of the tank; the lease was considered in the opinion as simply one indication of the ownership of the gasoline (which was not otherwise very clear). To make a heavy tax now turn on the existence *vel non* of a formal one-dollar lease merely emphasizes the inherent discrimination the court reads into the statute.[4]

The *Tennessee Oil* and the instant case, taken together, indicate that where the United States is not concerned the State looks to the ownership of the gasoline to determine taxability, but where the United States is the owner it looks solely to the storer or distributor. No reason for this difference is or can be given, except the desire to

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[4] If the Tennessee taxing authorities, in the period from 1943 to 1946 when the arrangement was operative, had sought to rest the tax on this formal distinction, the United States and Esso would undoubtedly have added a clause to the contracts making such a one-dollar lease. In that respect, the State Supreme Court's opinion errs when it says that "the record does not show that Esso was prejudiced in any way by a failure to collect the tax."

In 1941 and 1943, Tennessee amended its statutes to provide special provisions for the exemption of state governmental units (2 Williams' Tennessee Code, Sec. 1148.22), but the State Supreme Court did not refer to, or rest on, these provisions.

claim a tax which would otherwise be uncollectible. But the unbroken doctrine in this Court is that, whatever a State's taxing laws may do, they cannot discriminate against the United States or against private persons who deal or contract with the United States. Such discrimination is outlawed by the Supremacy Clause and by the constitutional implications of our federal system, as well as by the Equal protection clause of the Fourteenth Amendment. *New York* v. *United States*, 326 U.S. 572, 575-6, 584-5, 586; see *Penn Dairies, Inc.* v. *Milk Contr. Commission*, 318 U.S. 261, 269; *Alabama* v. *King & Boozer*, 314 U.S. 1, 8; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 480, 488; *Helvering* v. *Gerhardt*, 304 U.S. 405, 413, 420, 425; *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 385, 386; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149, 157, 158, 164 (fn. 13), 170-1, 172; *Taber* v. *Indian Territory Co.*, 300 U.S. 1; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 120; *Indian Territory Oil Co.* v. *Board*, 288 U.S. 325, 327-328; *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 131; *Pacific Co., Ltd.* v. *Johnson*, 285 U.S. 482, 493-5, 496; *Group No. 1 Oil Corp.* v. *Bass*, 283 U.S. 279, 282; *Alward* v. *Johnson*, 282 U.S. 509, 513-514; *Willcuts* v. *Bunn*, 282 U.S. 216, 225, 226, 229; *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 392; *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 631-632; *Miller* v. *Milwaukee*, 272

U.S. 713, 715; *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 524.[5]

The Equal Protection Clause is also applicable in this case to bar Tennessee from discriminating against Esso by imposing a tax where the State Supreme Court, by adhering to the rationale of the *Tennessee Oil* case, has indicated that for other companies in similar circumstances the tax, if collectible at all, would be on the owner of the gasoline and not on the storer. See *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623.

3. The issues presented on this appeal are of public importance. A large sum of money, about $4,000,000, ultimately turns on the decision of the Supreme Court of Tennessee. And substantial allegations that a state is taxing Government property or is discriminating against the United States in its tax system always merit review because this Court is the appointed arbiter to settle "the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the

[5] See also, to the same effect, the dissenting opinions in *Brush* v. *Commissioner*, 300 U.S. 352, 375, 378; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 120, 123 ff; *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 638; *National Life Ins. Co.* v. *United States*, 277 U.S. 508, 530-531; *Long* v. *Rockwood*, 277 U.S. 142, 149, 150.

same time and in the same territory." *United States* v. *Allegheny County*, 322 U.S. 174, 175, 176.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.